

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

GEORGIA PACIFIC CORPORATION,)	
)	
Appellant,)	PCHB No. 88-102
)	
v.)	
)	
State of Washington, DEPARTMENT)	ORDER GRANTING THE
OF ECOLOGY,)	DEPARTMENT OF ECOLOGY'S
)	MOTION FOR SUMMARY JUDGMENT
)	ON LIABILITY
Respondent.)	

This case involves Georgia Pacific's appeal of the Department of Ecology's ("DOE") issuance of Notice of Penalty Incurred and Due NO. DE 88-273 (\$5,000). The parties agreed to handle the issue of liability by summary judgment filings.

The following things have been considered:

1. Appellant Georgia Pacific's January 25, 1989 Motion for Summary Judgement, Memorandum and Affidavits in Support;
2. DOE's February 8, 1989 Motion for Cross Summary Judgment, Memorandum and Affidavits in Support;
3. Georgia Pacific's filings on February 10, 1989 enclosing

1 cited 53 Fed. Reg. 14926, and on February 14, 1989 Reply Memorandum;
2 and

3 4. DOE's February 22, 1989 Reply and Exhibits in Support.

4 On February 24, 1989, the Board heard oral argument. Present for
5 the Board were: Judith A. Bendor (Presiding), Wick Dufford
6 (Chairman), and Harold S. Zimmerman (Member). Attorney Jeffrey D.
7 Goltz of Lane Powell Moss & Miller (Olympia) represented Georgia
8 Pacific. Assistant Attorney General Doug Mosich represented DOE.

9 Based on the filings and counsel's contentions, on February 24,
10 1989 the Board issued an oral ruling granting the Department's motion
11 for summary judgment on the issue of liability. This written order
12 confirms that oral ruling.

13 UNCONTESTED FACTS

14 1. On March 23, 1988, Georgia Pacific on its own monitors
15 recorded an exceedance of the state ambient air standards for sulfur
16 dioxide (SO₂). Levels detected were .75 ppm (parts per million) for
17 one hour, between 5:00 p.m. and 6:00 p.m. The ambient standard is .40
18 ppm for one hour. Georgia Pacific concedes that emissions from its
19 Bellingham facility, which produces pulp, and paper and chemical
20 products, caused this exceedance.

21 2. Also on March 23, 1988, Georgia Pacific detected ambient
22 SO₂ levels of .42 ppm between 6:00 p.m. and 7:00 p.m., and above .25
23 ppm from 10:00 p.m. to 11:00 p.m.

24 3. These ambient levels were reported to the Northwest Air
25

26 ORDER GRANTING
27 MOTION FOR SUMMARY JUDGMENT
PCHB No. 88-102

1 Pollution Control Authority.

2 4. On July 3, 1987, Georgia Pacific's facility caused the
3 ambient SO₂ air quality standard of .40 ppm to be exceeded. A
4 Notice of Penalty was issued and the fine paid.

5 5. On November 19, 1986, Georgia Pacific's facility caused the
6 ambient air quality standard of .40 ppm to be exceeded, when from 6:00
7 a.m. to 7:00 a.m. ambient levels reached .55 ppm. This resulted in a
8 Notice of Penalty which was paid after litigation, Georgia Pacific v.
9 DOE, PCHB No. 87-45. (August 31, 1988).

10 6. On June 24, 1988, DOE issued Notice of Penalty No. 88-DE273
11 alleging that on March 23, 1988 Georgia Pacific exceeded WAC
12 173-474-100(1), the State SO₂ ambient air quality standard .40 ppm
13 one-hour average when .75 ppm level occurred. (DOE did not allege
14 that the .42 ppm level detected between 6:00 p.m. and 7:00 p.m. was an
15 exceedance, as the State's enforcement policy allows for a 10% margin
16 of error. According to the State, a reading of .44 ppm is necessary
17 before an exceedance occurs.) DOE alleges that the July 3, 1987
18 exceedance serves as the previous exceedance within 365 days of March
19 23, 1988, such that WAC 173-474-100 has been violated.

20 LEGAL ISSUES

21 WAC 173-474-100 states in part:

22 Sulfur oxide in the ambient air, measured as sulfur
23 dioxide shall not exceed the following values: (1)
24 Four-tenths parts per million (0.4 ppm) by volume
25 average for a one hour period more than once per one
year period. [Emphasis added]

26 ORDER GRANTING
27 MOTION FOR SUMMARY JUDGMENT
PCHB No. 88-102

(3)

1 "Period" is defined as "any interval of the specified time". WAC
2 173-474.

3 The legal issue is what does the phrase "more than once per one
4 year period" mean?

5 Appellant Georgia Pacific argues that no overlap of years can
6 occur in determining whether there is a violation. In sum, Georgia
7 Pacific argues that the July 3, 1987 exceedance cannot be within the
8 one year period which includes November 19, 1986 and also be within a
9 separate one year period which includes March 23, 1988.

10 Respondent DOE argues that overlaps are not prohibited. The
11 agency asserts that "more than once per one year period" means more
12 than once in the preceeding 365 days, ^{and so} that March 23, 1988 is within
13 365 days of July 3, 1987.

14 Having considered the filings and counsel's argument, the Board
15 issues the following:

16 I

17 We conclude that the plain language of "more than once per one
18 year period" at WAC 173-474-100 means more than once in the preceeding
19 365 days. With this meaning it is a simple standard to understand.
20 The standard affords the emitter one unpenalized exception to the
21 ambient standard limit of .40 ppm when the standard has not been
22 violated in the previous 365 days. When that level has been exceeded
23 once, the emitter is on clear notice that a penalty can be levied for
24

25
26 ORDER GRANTING
27 MOTION FOR SUMMARY JUDGMENT
PCHB No. 88-102

1 a second exceedance in the ensuing 365 days. Georgia Pacific's
2 proposed method of calculating a one year period, not allowing any
3 overlap, is complicated and not an easy one to calculate.

4 This interpretation of plain language constitutes a strict
5 construction of an exception to rules implementing a remedial statute,
6 and as such conforms with the overall goals of the Clean Air Act,
7 Chpt. 70.94 RCW, to promote compliance. See, Mead School District v.
8 Mead Education Association, 85 Wn.2d 140, 530 P.2d 302 (1975).

9 Moreover, ambient air quality standards are health-based
10 standards and exceptions which are narrow promote public health.
11 Ambient SO₂ air violations pose a threat to public health.

12 II

13 In so concluding, we are unpersuaded by appellant's argument that
14 because EPA has indicated that in general it has used and will
15 continue to use the "block" method of calculating a yearly period, (53
16 Fed. Reg. 14949 (April 26, 1988)) therefore WAC 173-474-100
17 incorporates that method. State regulations may be more stringent
18 than federal regulations. See, Union Electric Company v. EPA, 450 F.
19 Supp. 805, (D.C. Mo., 1978), rev'd on other grounds, 593 F.2d 299,
20 cert. den. 444 U.S. 839, (1979). Kamp v. Hernandez, 752 F.2d 1444
21 (9th Cir., 1985), modified 778 F.2d 527 (9th Cir. 1985), regarding
22 EPA's interpretation of its ambient SO₂ standard in the context of
23 Arizona's air implementation plan, is not germane to this case.
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

III

We conclude that the Department of Ecology in the exercise of its discretion has chosen to levy a \$5,000 fine under RCW 70.94.431(2). We decline to intrude into the Department's exercise of its discretion in the choice of which statutory subsection to use as the basis for penalty. Georgia Pacific, supra. Moreover, we conclude that the Director of DOE had properly delegated the authority to sign civil penalty orders to the program manager of the Central Operations Program. The program manager signed the Order, No. DE 88-273.

IV

In reaching these conclusions the Board did not rely on the affidavits of Marc Crooks or Victor Feltin filed by DOE.

ORDER

Penalty No. DE 88-273 as to the March 23, 1988 SO₂ ambient exceedance is AFFIRMED as to liability, confirming our oral ruling February 24, 1989.

SO ORDERED this 3rd day of March, 1989.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


WICK DUFFORD, Chairman


HAROLD S. ZIMMERMAN, Member

ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT
PCHB No. 88-102

(7)